

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILL CO LTD.,

Plaintiff,

v.

DOES 1-20, FELLOW SHINE
GROUP LIMITED, KAM KEUNG
FUNG,

Defendant.

CASE NO. 3:20-CV-5666-DGE

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO COMPEL

The District Court referred this action to United States Magistrate Judge David W. Christel. Currently pending before the Court are Plaintiff's Motions to Compel Discovery from Defendant Kam Keung Fung (Dkt. 47) and from Defendant Fellow Shine Group Ltd. (Dkt. 49).

BACKGROUND

On July 8, 2020, Plaintiff Will Co. Ltd.—a Japanese limited liability company that allegedly manages a library of over 50,000 adult entertainment movies protected by copyright registrations obtained from the United States Copyright Office—filed a Complaint seeking damages and injunctive relief for copyright infringement pursuant to 17 U.S.C. § 101 et seq. Dkt.

1 1. The Complaint alleges that Defendant Fellow Shine Group Ltd. (Defendant FSG)—a British
2 Virgin Islands limited liability company that operates out of Taiwan—and Defendant Kam
3 Keung Fung (Defendant Fung)—a resident of Hong Kong—jointly own and operate the website
4 Avgle.com, which Plaintiffs believe to be a “pirate” website that steals content from others and
5 displays it free of charge to the viewer. *Id.* at 1-2, 7-8. In addition, Plaintiff names Defendant
6 Does 1-20 who are currently unknown individual(s) and/or entity(ies) that own and operate a
7 website located at the uniform resource locator <https://avgle.com> (the Avgle website). *Id.* at 3.
8 Plaintiff asserts that this Court may exercise personal jurisdiction over Defendants pursuant to
9 Fed. R. Civ. P. 4(k)(2). *Id.* at 5.

10 According to Plaintiff, Avgle.com displays many of Plaintiff’s copyrighted works
11 without license or authorization. *Id.* at 9. Citing an analysis dated July 2020, Plaintiffs allege that
12 for the three-month period ending June 30, 2020, the Avgle website averaged approximately
13 35.09 million monthly visitors, of which 7.32% were viewers in the United States, meaning the
14 Avgle website is visited by 2.7 million United States users every month. *Id.* at 3.

15 This is no coincidence, according to Plaintiff, because Defendants intentionally target
16 United States users, which is evident from, among other things, the fact that fact key pages of the
17 Avgle website are in English, the website contains a 2017 copyright notice at the bottom of each
18 page, and it advises users that the IP address is being tracked and upon request by the FBI such
19 information will be disclosed to this United States law enforcement agency. *Id.* at 4-5. Plaintiff
20 also alleges that Defendants utilize domain name servers located in California and owned by
21 Cloudflare, Inc.—a corporation incorporated under the laws of the State of Delaware. *Id.* at 4.
22 Moreover, Plaintiff alleges that Defendants use a Content Delivery Network with servers located
23 in the United States that permit faster more efficient streaming of videos to nearby users. *Id.*
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1 Finally, the Avgle website allegedly displays “geo-targeted” advertisements that permit it to
2 display ads of particular interest to a United States viewer. Dkt. 1 at 4.

3 On December 24, 2020, Defendant FSG and Defendant Fung moved to dismiss all claims
4 against them based on a lack of personal jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(2),
5 insisting they do not have any relevant, continuing, or substantial connection to the state of
6 Washington, or even to the United States as whole, sufficient for this Court to exercise personal
7 jurisdiction over them. Dkt. 23 at 2.

8 On January 25, 2021, Plaintiff responded in opposition, but also requested permission to
9 conduct jurisdictional discovery before ruling on Defendants’ motion to dismiss. Dkt. 28 at 25.

10 On July 19, 2021, the Court took Defendants’ motion to dismiss under advisement to
11 permit Plaintiff time to conduct limited jurisdictional discovery and file an amended response to
12 the motion to dismiss. Dkt. 43. In so doing, the Court made many findings critical to the
13 determination of the motions at bar. The Court found that because the alleged infringement took
14 place (and/or continues to take place) entirely outside the United States, the question of personal
15 jurisdiction depends upon the effects of Defendant’s conduct within the forum as well as their
16 intent. *Id.* at 5. The Court then determined that the “intent” prong was satisfied, explaining:

17 FSG acknowledges that its ownership and operation of the Avgle.com website is a
18 jurisdictionally sufficient “intentional act.” Dkt. # 23-1 at 12. Mr. Fung argues,
19 however, that because he is neither the owner nor the operator of Avgle.com, he
20 has not engaged in a comparable intentional act that would support the exercise of
21 jurisdiction over him. The Court disagrees. Mr. Fung personally performed or
22 oversaw almost every aspect of Avgle.com’s development, including purchasing
23 the domain name, adapting a template and source code to create the website, and
24 taking steps to ensure that the website was universally accessible. That he was
acting in his capacity as a director of Awesapp does not change the fact that he
acted with an intent to perform the real, physical acts that gave rise to Avgle.com.
Mr. Fung’s actions were intentional acts which satisfy this first prong.

1 *Id.* at 5. Regarding Defendants’ conduct within the forum, the Court concluded that Plaintiff had
 2 not yet met its burden of establishing that Defendant FSG and/or Defendant Fung “expressly
 3 aimed” or “purposefully directed” their website at the United States sufficient to prove
 4 “intentional acts” and jurisdictional discovery should be aimed at proving as much. *Id.* at 11.

5 On August 11, 2021, Plaintiff propounded discovery requests upon Defendants. On
 6 September 14, 2021, Defendants served Plaintiff with responses. Dkt. 47 at 2; Dkt. 49 at 2.

7 On November 28, 2021, Plaintiff filed the pending motions to compel. Dkt. 47; Dkt. 49.
 8 On December 13, 2021, Defendants filed a joint response in opposition (Dkt. 52) and on
 9 December 17, 2021 Plaintiffs filed a reply. Dkt. 53.

10 STANDARD

11 District courts have broad discretion to grant discovery to establish jurisdiction. *Laub v.*
 12 *United States DOI*, 342 F.3d 1080, 1093 (9th Cir. 2003); *see also Wells Fargo & Co. v. Wells*
 13 *Fargo Express Co.*, 556 F.2d 406, 430 n. 24 (9th Cir. 1977). Such discovery “should ordinarily
 14 be granted where pertinent facts bearing on the question of jurisdiction are controverted or where
 15 a more satisfactory showing of the facts is necessary.” *Butcher's Union Local No. 498 v. SDC*
 16 *Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986); *see also Data Disc, Inc. v. Systems Tech. Assocs.*,
 17 *Inc.*, 557 F.2d 1280, 1285 n. 1 (9th Cir. 1977). “The Court must weigh the prejudice to the
 18 complaining party if discovery is denied.” *Andrews v. Pride Indus.*, Case No. 2:14-cv-02154-
 19 KJM-AC, 2015 WL 1014133, at *5 (E.D. Cal. Mar. 6, 2015) (*citing Laub*, 342 F.3d at 1093).
 20 “Prejudice is established if there is a reasonable probability that the outcome would have been
 21 different had discovery been allowed.” *Id.* The Ninth Circuit may find an abuse of discretion
 22 where a court denies discovery where such discovery “might well demonstrate facts sufficient to
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1 constitute a basis for jurisdiction.” *Rutsky & Co. Ins. v. Bell & Clements Ltd.*, 328 F.3d 1122,
 2 1135 (9th Cir. 2003).

3 Plaintiff at this stage of the proceedings is entitled to conduct jurisdictional discovery to
 4 the extent that it is “precisely focused discovery aimed at addressing matters relating to personal
 5 jurisdiction.” *Cabell v. Zorro Prods.*, 294 F.R.D. 604, 608 (W.D. Wash. 2013)(quoting *U.S. ex*
 6 *rel. Barko v. Halliburton Co.*, 270 F.R.D. 26, 28 (D.D.C. 2010) (quoting *GTE New Media Servs.*
 7 *Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1352 (D.C. Cir .2000))). Personal jurisdiction in this
 8 forum is proper where Defendants have “minimum contacts” with the State of Washington and
 9 the exercise of jurisdiction “does not offend traditional notions of fair play and substantial
 10 justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945).

11 This Court has already determined that Plaintiff’s jurisdictional claim should be
 12 evaluated under the federal long-arm statute (Dkt. 43 at 4), Fed. R. Civ. P. 4(k)(2), which
 13 authorizes the exercise of personal jurisdiction where: (1) the claim arises under federal law, (2)
 14 Defendants are not subject to the personal jurisdiction of any state court, and (3) the Court’s
 15 exercise of jurisdiction over Defendants comports with due process. *Holland Am. Line Inc. v.*
 16 *Wartsila N. Am., Inc.*, 485 F.3d 450, 461 (9th Cir. 2007).

17 Additionally, in the context of a copyright infringement claim the court conducts a three-
 18 part inquiry to determine whether a nonresident defendant has such “minimum contacts” with the
 19 forum to warrant the court’s exercise of specific jurisdiction without violating due process: (1)
 20 the defendant must either “purposefully direct his activities” toward the forum or “purposefully
 21 avail[] himself of the privileges of conducting activities in the forum”; (2) “the claim must be
 22 one which arises out of or relates to the defendant’s forum-related activities”; and (3) “the
 23 exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be
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reasonable.” *AMA Multimedia*, 970 F.3d 1201, 1208 (9th Cir. 2020)(quoting *Axiom Foods, Inc. v. Acerchem Int’l, Inc.*, 874 F.3d 1064,1068 (9th Cir. 2017). “If any of the three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law.” *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995). Plaintiff bears the burden to establish the first two prongs. *See Axiom Foods, Inc. v. Acerchem Int’l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017).

DISCUSSION

As discussed, *supra*, this Court previously granted Plaintiff’s request for time to conduct limited jurisdictional discovery and file an amended response to Defendants’ pending motion to dismiss. Dkt. 43. The Court described potentially relevant jurisdictional discovery as follows:

At present, the evidence reveals a worldwide or Asian focus, but additional discovery regarding, inter alia, the business plan for defendants’ foray into on-line adult entertainment, the circumstances under which an English language website with prominent reference to U.S. law was chosen as a template, how and why that template was edited, the terms under which Cloudflare provides CDN services, the nature of the arrangement with JuicyAds and/or the advertisers it procures, and the percentage of U.S.-based content and revenues could materially alter the analysis.

Dkt. 43 at 11. Yet, according to Defendants, “Plaintiff saw this Court’s Order as a green light to conduct far-reaching, jurisdictionally irrelevant discovery, serving Fellow Shine Group Limited with 31 separate document requests and Kam Keung Fung with 24 separate document requests, the vast majority of which had little or no connection to any jurisdictional issues.” Dkt. 52 at 1.

Plaintiff moves to compel for the specific reasons discussed below, and because generally Defendants have objected to producing “only those documents regarding companies [located] in the United States or which referenced the United States,” which Plaintiff believes to be insufficient because Defendants could have “had contact or worked with a company outside the United States which is known to provide service within the United States market” and just

1 because a document does not reference the United States does not render it irrelevant to the
2 United States.” Dkt. 47 at 5-6; Dkt. 49 at 6.

3 The parties have grouped the disputed discovery into several convenient categories,
4 which the Court will also utilize.

5 I. Requests 3-6 to Defendant FSG / Requests 1-4 to Defendant Fung

6 Turning to the first category of documents Plaintiff seeks to compel, Plaintiff seeks any
7 website hosting contracts, invoices, payments, and communications with any website hosting
8 companies, which he argues are needed to determine if the Avgle website intentionally targeted
9 the United States. Dkt. 47 at 6; Dkt. 49 at 6.

10 Defendants insist the Avgle website servers have always been hosted by a company in the
11 Netherlands, that it has no contracts with foreign-based companies that concern hosting or
12 directing content to the United States, and that it has no documents “reflecting either hosting
13 content within the United States or users from the United States accessing content hosted on
14 computers located outside the United States.” Dkt. 52 at 5-6. Defendants further aver that they
15 have no invoices from any hosting company that in any way reference the United States. “So, for
16 example, if Plaintiff were trying to determine whether Defendants had invoices that would
17 suggest that [Defendant] FSG was paying a host for servers specifically designed to service US
18 traffic (as opposed to website traffic from the entire world), Defendants have fully and
19 completely responded that they have no such documents.” Dkt. 52 at 6.

20 Plaintiff retorts that it should not be limited to website hosting companies located in the
21 United States or those with servers located in the United States because even hosting companies
22 entirely outside the United States “may be contracted for efficient display in the United States”
23 even both the company and its servers are located outside the United States...”. *Id.*

1 While the Court accepts Defendants' averments, it also finds Plaintiff is entitled to review
2 the contracts, invoices, payments, and communications with any hosting company (regardless of
3 its physical location or the location of its servers) paid to host the Avgle website beginning in
4 January 2020 (which the Complaint identifies as the date Plaintiff discovered its copyrighted
5 works on display on the Avgle website) to present day, because they are relevant to whether
6 Defendants purposely directed and/or continue to direct the Avgle website at United States
7 viewers. *See* Dkt. 1 at 8-9, 11.

8 II. Requests 7-10 to Defendant FSG / Requests 5-8 to Defendant Fung

9 Next, Plaintiff seeks any payment processing contracts, invoices, payments, and
10 communications with payment processing companies such as PayPal. Dkt. 47 at 6-7; Dkt. 49 at
11 7. According to Plaintiff, evidence that a payment processor used by Defendants is contracted to
12 handle payment from the United States could support a determination that the Avgle website was
13 intended to target the United States market. *Id.*

14 Defendants state that because Avgle.com is free to use, no users from the United States
15 pay to view videos. Dkt. 52 at 8. Instead, the Avgle website generates revenue through
16 advertising, and as discussed further below, Defendants utilize a foreign company for their
17 advertisement needs. *Id.*

18 The Court is satisfied by Defendants' response that there is nothing to compel under this
19 category.

20 III. Requests 11-14 to Defendant FSG / Requests 9-12 to Defendant Fung

21 Plaintiff next seeks access to any contracts, invoices, payments, and communications
22 with any ad brokers because, as Defendants have explained, the Avgle website generates revenue
23 solely through advertisements. Dkt. 47 at 7-8; Dkt. 49 at 7-8.

1 Defendants did produce a written contract with a Canadian advertising company called
2 Tiger Media, and represented that no other responsive documents exist because they pay Tiger
3 Media a “flat rate” for each ad and have no input regarding whom to target. Dkt. 52 at 9-10.

4 The Court previously determined “third-party conduct that targets advertising toward
5 certain users does not establish that defendants expressly aimed their conduct at the U.S.” absent
6 “some evidence that defendants insisted that geotargeting be offered to U.S. advertisers or
7 otherwise created incentives that favored such services in this forum[.]” Dkt. 43 at 10. Plaintiff is
8 entitled to discover whether evidence of such insistence and/or incentivization exists. Thus,
9 Plaintiff is entitled to review contracts between Defendants and any and all ad brokers, payments
10 to and from any and all ad brokers, and communications with any and all ad brokers relating to
11 advertisements displayed on the Avgle website beginning January 2020 (which the Complaint
12 identifies as the date Plaintiff discovered its copyrighted works on display on the Avgle website)
13 through present day. *See* Dkt. 1 at 8-9, 11

14 IV. Requests 15-18 to FSG / Requests 13-16 to Defendant Fung

15 Plaintiff also seeks any and all direct communication between Defendants and any entity
16 that might have advertised on the Avgle website (but did not go through a third-party advertising
17 agent) including contracts, invoices, payments, and communications between Defendants and the
18 entity. Dkt. 49 at 8.

19 Defendants protest that this request is “an absurd attempt to justify requests that have no
20 purpose other than to try to pressure [Defendant] FSG by threatening to draw its advertisers into
21 the middle of litigation in the United States. Even if this weren’t patently ridiculous (and
22 harassing and abusive), Defendants have clarified that they have no responsive documents that
23 refer to or relate to the United States.” Dkt. 52 at 11. Defendants do admit, however, that they
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1 possess two agreements with Chinese companies that “say nothing about advertising aimed at the
2 United States.” *Id.*

3 Plaintiff should not be bound by Defendants’ conclusion that the responsive documents it
4 possesses are insufficient to establish personal jurisdiction. Moreover, Plaintiff does not simply
5 seek the contracts, but also the invoices, payments, and communications with entities who
6 engaged in direct advertising on the Avgle website that could indicate advertisements would be
7 and/or are expressly aimed at United States viewers. Defendants fail to provide any analysis or
8 reasoning to support the claim of harassment and abuse, and the Court finds no evidence
9 suggesting that the production requested would result in a large amount of files or that it would
10 be unduly burdensome. Plaintiff is entitled to review any and all direct communication between
11 Defendants and any entity (that did not go through a third-party advertising agent) regarding
12 advertising on the Avgle website beginning January 2020 (which the Complaint identifies as the
13 date Plaintiff discovered its copyrighted works on display on the Avgle website) through present
14 day, including contracts, invoices, payments, and communications between Defendants and any
15 such entity. *See* Dkt. 1 at 8-9, 11.

16 V. Requests 17-18 to Defendant Fung

17 Plaintiff seeks all communications and contracts between Defendant Fung and Defendant
18 FSG, because Defendant Fung created the Avgle.com website and brokered all contracts for the
19 site operation and revenue generation. Dkt. 47 at 8-9. Plaintiff believes these communications
20 could reveal instructions regarding site creation and target markets. *Id.*

21 Defendant Fung validly objects that this request is not limited to communications
22 between the two Defendants concerning the Avgle website. Dkt. 52 at 13. He also argues that his
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1 response to these requests stated that he “has no such documents that specifically reference or
2 concern the United States in [his] care, custody, or control.” *Id.*

3 Once again, Plaintiff should not be bound by Defendants’ conclusion that the responsive
4 documents it possesses are insufficient to establish personal jurisdiction. The Court concurs with
5 Plaintiff that it is entitled to review responsive documents that relate to Defendant Fung’s work
6 for Defendant FSG in connection with the Avgle website. Significantly, as stated *supra*, the
7 Court previously determined that Defendant Fung oversaw almost every aspect of the creation of
8 the Avgle website. Dkt. 43 at 5. Thus, the Court concurs with Plaintiff that Defendant Fung’s
9 communications and contracts with Defendant FSG could reveal the “business plan” for the
10 Avgle website, “the circumstances under which an English language website with prominent
11 reference to U.S. law was chosen,” and “how and why the template was edited”—all potentially
12 material to the jurisdictional analysis required to rule on the pending motion to dismiss. Dkt. 43
13 at 11. Consequently, Defendant Fung must produce documents responsive to this request, limited
14 by the caveat that the communications and contracts must be related to Defendant Fung’s work
15 for Defendant FSG in connection with the Avgle website.

16 VI. Requests 24 & 26 to Defendant FSG

17 Plaintiff seeks any documents, including emails, memorandum, reports, and meeting
18 minutes referencing website hosting companies. Dkt. 49 at 8. And finally, Plaintiff seeks
19 documents, including emails, memorandum, reports, and meeting minutes, referencing the
20 United States. *Id.* at 9. Plaintiff argues that such documents may indicate Defendants’ thought
21 process in selecting their website hosting company, such as whether they ruled out companies
22 that refused to or were unable to display content in the United States. *Id.*; Dkt. 53 at 5.

1 Defendant objects to the relevance of documents referencing website hosting companies
2 as not precisely focused enough to discover matters relating to personal jurisdiction, and argues
3 that the request for any documents referencing the United States is overbroad and could turn up
4 emails containing personal conversations entirely unrelated to this matter. Dkt. 52 at 11-12.

5 Although Plaintiff should not be bound by Defendants' conclusion that the responsive
6 documents it possesses are insufficient to establish personal jurisdiction, the Court finds
7 Plaintiffs requests under this category are overbroad and unduly burdensome, and not precisely
8 focused enough to illicit discovery relevant to establishing personal jurisdiction. Thus, the Court
9 finds Defendant FSG must produce responsive documents in its possession, custody or control
10 referencing *both* website hosting companies and the United States in the same document
11 (including emails, memorandum, reports, and meeting minutes).

12 ATTORNEY'S FEES

13 Each party claims entitlement to attorney fees for bringing and defending against these
14 motions. Fed. R. Civ. P. 37(a)(5)(A) provides that when a discovery motion is granted, the court
15 generally "must" order the opposing party or counsel to pay "the movant's reasonable expenses
16 incurred in making the motion, including attorney's fees." An opposing party may avoid such an
17 award only if its position was "substantially justified" or "other circumstances make an award of
18 expenses unjust." *See* Fed. R. Civ. P. 37(a)(5)(A)(ii)-(iii).

19 While the Court grants in part and denies in part Plaintiff's motion to compel, the Court
20 denies ordering Defendants to pay Plaintiff's attorney's fees for bringing the motion because
21 some of Defendants' objections were substantially justified, and many of Plaintiff's requests for
22 production required modification.
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CONCLUSION

For the reasons stated above, the Court grants in part and denies in part Plaintiff's Motion to Compel Discovery from Defendant Kam Keung Fung (Dkt. 47) and Plaintiff's Motion to Compel Discovery from Defendant Fellow Shine Group Limited (Dkt. 49). Defendants must serve supplemental responses upon Plaintiffs within 30 days of the undersigned date. The Court also denies all motions for attorney's fees.

Dated this 21st day of March, 2022.



David W. Christel
United States Magistrate Judge